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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT DAVID CISNEROS,

Defendant and Appellant.

F071982

(Super. Ct. No. BF155006A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Kane, J. and Smith, J.

Albert David Cisneros was convicted by a jury of the second degree murder of David Reese, his former companion. The only issue at trial was which crime Cisneros committed as the evidence that he stabbed Reese causing his death was undisputed. Appellate counsel filed a brief asserting that after reviewing the record, she could not identify any arguable issues. After thoroughly reviewing the record, we agree there are no arguable issues in this case and, accordingly, affirm the judgment.

## **FACTUAL AND PROCEDURAL SUMMARY**

### *The Charges*

The only count in the first amended information charged Cisneros with the first degree murder of Reese. (Pen. Code, § 187, subd. (a).)<sup>1</sup> The information also alleged Cisneros (1) used a deadly or dangerous weapon during the commission of the offense within the meaning of section 12022, subdivision (b)(1), (2) had suffered a prior conviction which constituted a strike within the meaning of section 667, subdivisions (c)-(j), and (3) had suffered a serious felony conviction within the meaning of section 667, subdivision (a).

### *The Testimony*

Mary Diaz had known both Cisneros and Reese for a number of years. Cisneros and Reese had been in a romantic relationship, but on the day in question the two were no longer together. Because the two argued when they were together, Diaz told Reese to not come to her apartment.

Cisneros had spent the night at Diaz's apartment, as he often did. The following morning, Reese came by and asked to come in because he missed Diaz. Diaz asked Cisneros if he was comfortable with Reese coming inside the apartment, and Cisneros said it was acceptable.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

Reese was in a good mood that morning. Reese and Cisneros went out to the patio of the apartment and talked. It appeared to Diaz as if they were getting along well. The two walked to the local convenience store and purchased one can of an alcoholic beverage for each individual. The two made the trip several times that day, each apparently purchasing a can of alcoholic beverage each trip. Both Reese and Cisneros appeared to Diaz to be a little drunk after they consumed the alcoholic beverages.

Cisneros and Diaz would joke around and call each other offensive names on occasions. At one point that day, Cisneros called Diaz a bitch, and Diaz called Cisneros a faggot. Reese remarked to Cisneros that he should not have called Diaz a bitch. Cisneros apparently became upset and repeatedly hit Reese in the head. The two ended up on the ground wrestling. Diaz told the two to go outside if they were going to fight. Reese was on top of Cisneros, and told Cisneros to calm down. Cisneros wanted to get up and was upset. Reese eventually got up and sat down to smoke a cigarette. Cisneros walked to the kitchen, grabbed a knife, and then walked over to Reese and stabbed him in the chest. Cisneros then pulled the knife out of Reese's chest, threw it on the floor, and walked out of the apartment. Cisneros did not say anything.

Diaz called the emergency operator. Over defense counsel's objection, a recording of the call was played for the jury.

Mariah Bentley, Diaz's daughter, was at the apartment when the stabbing occurred, although she spent a large part of the day caring for her infant daughter. Her testimony was consistent with Diaz's testimony in all relevant respects.

Bakersfield police recovered the knife from the kitchen floor. Sergeant Ryan Kroeker also summarized the statements given by Diaz and Bentley after the incident occurred. Those statements were similar in most respects to the testimony given at trial. Diaz told Kroeker during the interview she did not believe Cisneros was drunk, but he began acting differently after the second drink. She also told Kroeker that Cisneros

retrieved the knife immediately after getting up off the ground and then walked directly to Reese and stabbed him. Kroeker also reviewed video tape from the convenience store from which the alcoholic beverages were purchased. These tapes showed Reese and Cisneros made three trips to the convenience store that day, each time purchasing beverages.

Bakersfield Police Officer Bryon Robert Sandrini was the first officer at the scene. After speaking with Diaz and Bentley, he left in an attempt to locate Cisneros. When he could not find Cisneros, he returned to the apartment. Cisneros returned to the apartment about two hours after the stabbing and was arrested. Cisneros was verbally abusive when Sandrini was walking Cisneros to his patrol vehicle. Cisneros did not appear to Sandrini to be under the influence of alcohol at the time.

The autopsy revealed the cause of death was the stab wound to the chest, which penetrated both the heart and one lung.

The parties stipulated that a sample of Cisneros's blood was obtained and tested on the day in question. The result of the test indicated that at the time the blood was obtained, Cisneros had a blood alcohol content of .10 percent. Criminalist Richard Maykoski opined that at the time of the stabbing, Cisneros's blood alcohol content would have been between .15 percent and .27 percent. Maykoski's calculations assumed no additional alcohol was consumed after the stabbing, and that at the time of the stabbing, all alcohol that had been consumed was absorbed from Cisneros's stomach into his blood.

Defense counsel called Naresh C. Jain as an expert witness on the issue of alcohol intoxication. He explained alcohol is a central nervous system depressant that affects all parts of your brain. As alcohol intake increases, more symptoms will become apparent. As the blood alcohol level rises, the symptoms become more pronounced. In general, symptoms include emotional instability, loss of critical judgment, impaired perception and memory, and loss of visual acuity. At higher blood alcohol levels symptoms also

include disorientation, mental confusion, dizziness, exaggerated emotional states, slurred speech, and incoherent thinking. Not everyone will suffer the same symptoms.

On cross-examination, Jain explained that habitual drinkers become tolerant to the effects of alcohol, but everyone who drinks alcohol will suffer some brain impairment.

#### *Closing Argument*

The prosecutor argued Cisneros's actions established that he acted willfully, deliberately, and with premeditation and malice aforethought. Accordingly, he urged the jury to return a verdict of first degree murder.

Defense counsel argued Cisneros was so intoxicated he could not form the mental state necessary to commit murder, and the jury's only options were either voluntary or involuntary manslaughter.

#### *Verdict and Sentencing*

The jury found Cisneros not guilty of first degree murder, but guilty of the lesser included offense of second degree murder. The jury also found the weapon enhancement true. In a bifurcated proceeding, the trial court found that Cisneros had suffered a prior conviction which constituted a strike within the meaning of section 667, subdivisions (c)-(j).

The trial court denied defense counsel's request to strike the prior conviction pursuant to the provisions of section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The trial court then sentenced Cisneros to the statutorily mandated indeterminate term of 15 years to life for the second degree murder conviction, doubled that term to 30 years to life because of the strike prior, and then enhanced that sentence by a determinate term of six years pursuant to the provisions of sections 12022, subdivision (b)(1) and 667, subdivisions (a).

## DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asserting that after a thorough review of the record, she could not identify any arguable issues. By letter dated April 1, 2016, we invited Cisneros to inform this court of any issues he wished us to address in this appeal. Cisneros did not respond to our letter.

Our review of the record did not identify any arguable issues. The evidence was undisputed that Cisneros stabbed Reese causing his death. The only issue was which crime was committed, murder or manslaughter. While defense counsel argued vigorously that the crime was manslaughter, the evidence overwhelmingly established that at a minimum the crime was second degree murder. Cisneros instigated the confrontation, obtained a knife as soon as Reese released him, walked to Reese and stabbed him in the chest. The wound was so deep it went through the heart and into the lung. On the other hand, the evidence of intoxication, on which defense counsel relied, was weak. It was undisputed that Cisneros drank alcoholic beverages that day, but it was also undisputed he was a habitual consumer of such beverages, and his actions did not suggest his level of intoxication was so great as to inhibit his ability to understand the choices he made that day.

The record also establishes that Cisneros received a fair trial. The evidence against him consisted primarily of percipient witness testimony as well as medical evidence. Defense counsel was able to introduce testimony to support her intoxication defense despite not retaining an expert to do so until after the trial had commenced. The issues over jury instructions were correctly resolved, and jury instructions included the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter. Closing arguments focused on the facts of the case and the reasonable inferences to be drawn. The trial court acted well within its discretion in

denying Cisneros's request that the prior strike conviction be stricken for sentencing purposes. The trial court thereafter imposed the statutorily mandated sentence.

**DISPOSITION**

The judgment is affirmed.